UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

KROGER LIMITED PARTNERSHIP I,
MID-ATLANTIC

Respondent,

and Case 5-CA-155160

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 400 (UFCW),

Charging Party.

BRIEF OF RESPONDENT, KROGER LIMITED PARTNERSHIP I, MID-ATLANTIC, IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Kroger Limited Partnership I, Mid-Atlantic (hereinafter, "Kroger"), by counsel, respectfully submits this Brief in support of its Exceptions to the Decision of the Administrative Law Judge issued on September 9, 2016 (the "Decision"). The relevant evidence establishes that Kroger has not interfered with, restrained or coerced employees in the exercise of rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the National Labor Relations Act (hereinafter, the "Act").

I. STATEMENT OF THE CASE

On December 31, 2015, the General Counsel filed a Complaint alleging that Kroger had violated Section 8(a)(1) of the Act.[1] The Complaint alleged that Kroger selectively and disparately enforced a "no solicitation/no loitering" rule by applying it to exclude from its leased property two non-employee representatives of the Union, who were approaching customers of a

[1] The Complaint was predicated upon the June 30, 2015, unfair labor practice charge filed against Kroger by the United Food and Commercial Workers Union, Local 400 (Charge No. 05-CA-155160).

Portsmouth, Virginia Kroger store with a "do not patronize" petition. (Complaint ¶ 6; official transcript of March 29, 2016, hearing, pp. 57-58, hereinafter cited as "Tr. ____.") Kroger timely filed its Answer and Affirmative Defenses, admitting that it did exclude the representatives employed by the Union, but denying that its conduct operated to discriminate against the Union or otherwise violate the Act in any way.

The matter came on for hearing before the Honorable Donna Dawson, Administrative Law Judge (the "ALJ"), on March 29, 2016. At the hearing, Counsel for the General Counsel confirmed that the General Counsel did not dispute Kroger's property interest in the areas at issue (the common areas, parking lot and sidewalk adjacent to Store 538) and that no such claim would be pursued in this matter. (Tr. 17).

II. STATEMENT OF FACTS

A. Background and Stipulations

Kroger operated Store Number 538 (located at 5601 High Street in Portsmouth, Virginia) from at least 1997 through the date of the store's closing on April 11, 2015. (Tr. 15). Since on or about March 28, 2010, the Union has been the collective bargaining representative of certain employees at Kroger's stores in the Hampton Roads, Virginia area, including (while it was in operation) Store Number 538. (Tr. 15).

Kroger leased the property for Store Number 538 from Sterling Creek Commons Limited Partnership (the "Landlord"), and the store was one tenant of a multi-tenant retail shopping center. (Tr. 15-16). It was stipulated by the parties that, at all relevant times, Kroger's lease with the Landlord contained the following language:

> To the extent not prohibited by applicable laws, the Parking Areas and Common Facilities shall be subject to a uniform "no solicitation/no loitering" rule, pursuant to which all solicitation, loitering, handbilling, and picketing for any cause or purpose whatsoever shall be prohibited within the Parking Areas and Common

> Facilities. Either Landlord or Tenant may enforce said uniform no solicitation/no loitering rule to the extent it can be done in a lawful manner by excluding or removing persons engaged in soliciting, loitering, handbilling, or picketing from the Parking Areas and Common Facilities, or by otherwise lawfully enforcing said rule. Tenant shall have the right, coupled with an interest, and is hereby expressly authorized by Landlord to enforce in a lawful manner said uniform no solicitation/no loitering rule within the Parking Areas and Common facilities.

(Tr. 16-17; Joint Exhibit 2).

B. History of Enforcement of Non-Solicitation Policy

Kroger consistently enforced the policy prohibiting solicitation, loitering, handbilling, and picketing contained in its lease for Store 538. As Store Manager, Donati High, testified, when groups or individuals would show up in the parking lot and begin soliciting, he and other managers would go to them and inform them of the prohibition. (Tr. 149-50). Mr. High testified that he recalled a church group that had appeared in the parking lot, and they were told that they could not continue that activity, whereupon they vacated the premises. (Tr. 149-50). Mr. High was never made aware of any club promoters placing handbills on cars or any college students selling books in the parking lot. (Tr. 150). Indeed, on every occasion that Mr. High became aware of solicitation activity in the parking lot, he took action to stop it. (Tr. 150-51). Mr. High was never required to call the police regarding someone soliciting on the property, except for during the incident with the Union representatives on April 2, 2016 (see infra, part II.C), however no other person had ever refused to leave the property when asked. (Tr. 161, 167).

Timothy Lynch, the former manager of Store 538 (from August, 2013 through June, 2014) , also testified that he routinely asked people to leave on occasions when he became aware of individuals approaching customers outside the store. (Tr. 170). Mr. Lynch confirmed that no party during his tenure had refused to leave when asked, so he had no occasion to seek out a letter regarding the no solicitation policy or to call the police. (Tr. 171-72). As with Mr. High,

there was never any occasion when he learned of people soliciting or handbilling in the parking lot and took no action to stop it (i.e., he asked them to leave on every occasion). (Tr. 173).

Similarly, Raymond Helvie, who served as a Co-Manager at Store 538 from June or July. 2013, until the end of March, 2015, reported that he periodically learned of people accosting customers in the parking lot. (Tr. 183). He described the store's practice as: "You ask them to leave. And if they don't leave, then we call the police and they'll take it from there." (Tr. 183-84). Mr. Helvie was required to call the police on one occasion – in response to a person in the parking lot asking customers for money – but the individual left before the police arrived. (Tr. 185-86).

As part of its community outreach efforts, Kroger Store 538 did occasionally permit charitable groups, such as the Salvation Army, to solicit donations in front of the store. (Tr. 148-49). Witnesses identified the groups who used this process including the Girl Scouts, Boy Scouts and disabled veterans groups, as well as the Lions Club. (Tr. 169, 183). These instances were "sporadic based upon request" and the requests (which were not always granted) totaled approximately "one [occasion] every month or two." (Tr. 152, 159).

The Union presented only two witnesses who testified concerning Store 538's history of enforcing its no solicitation probation as to non-employees on the property. The first, Tonja Edwards, testified about seeing several unauthorized people soliciting in the parking lot over the course of her seven years of employment, yet she did not offer any evidence that management became aware of and then ignored any such instance. (Tr. 73-91).

The Union's last witness, Laverne Wrenn, testified that she worked at Kroger Store 538 from 2000 through March or April of 2015 (where she was a shop steward), but is now employed by the Union as a Business Agent. (Tr. 110). On direct examination, Ms. Wren testified that on

one occasion (in "[a]bout Spring of 2015) she received a complaint from a customer named "Annemarie" that a church group was in the parking lot soliciting for money.[2] (Tr. 105). Ms. Wrenn then testified that she told Mr. High about this complaint and he just shrugged his shoulders, and did not give a verbal response. Ms. Wrenn also claimed that in 2014 she had advised a prior store manager – whom she could not identify – of a similar complaint and that he "just walked off." (Tr. 107).

During cross examination, Ms. Wrenn was asked about the portion of her Board Affidavit concerning a church group soliciting at Store 538 that reads:

> The first time I saw this, I reported it to the Store Manager. I do not remember what store manager it was.

(Respondent's Exhibit 2; Tr. 113-14). Ms. Wrenn confirmed that this was a reference to the alleged 2014 customer complaint she had previously testified about. (Tr. 114).

Ms. Wrenn was then asked about her subsequent statement: "About a year ago, a customer named Annemarie mentioned to me that a church group was soliciting in the parking lot and I said I had already reported it to management." (R.'s Ex. 2; Tr. 114-15). When confronted with the fact that her sworn affidavit made no mention whatsoever of reporting this incident to Mr. High, Ms. Wrenn at one point confirmed that her Affidavit was correct (i.e., that she did tell Annemarie that she had "already reported it to management"). (Tr. 188). Yet, Ms. Wrenn continued to assert that this was somehow not inconsistent with her prior hearing testimony:

> Q. In your statement, there is a statement here that says from July 2015, it says, "About a year ago, a customer named Annemarie mentioned to me that a church group was soliciting in the parking lot and I said I had already reported it to management." Is that the –
>
> A. That was –

[2] It should be noted that, on direct examination, Ms. Wrenn specifically identified this 2015 complaint as being made by "Annemarie."

Q. Let me just ask you this question.

JUDGE DAWSON: Let him finish.

Q. BY MR. TOWER: Is that what you said to Annemarie, I've already reported that to management?

A. Yes. Yes.

Q. So why would you say I've already reported that to management if in fact you went and reported it to Mr. High anyway after that?

A. Because it was previous. It was previous -- if you read the statement that was the previous, okay? And when Annemarie came and told me that, she told me that in the spring of 2015. And like I said, it was worded wrong through the court reporter or maybe I said it wrong, but that's what happened in 2015. When Annemarie came and told me, she was like there's someone out there soliciting for money. I said okay, I already told Donati about it. Okay? That's what -- that was like the previous. But I've told Donati about it. He just shunned. He just like he shunned his shoulders.

Q. So I'm clear what you're saying now is that this statement is wrong.

A. No, that statement is not wrong. It's written wrong.

Q. What are you talking about the court reporter –

A. I'm sorry, but it's written wrong. It's written wrong for what I had said.

Q. Doesn't that make it wrong?

A. No, it don't make it wrong. It's right. It's just wrong.

(Tr. 118-19). At one point, Judge Dawson attempted to pin down Ms. Wrenn on the alleged timeline of these two complaints:

JUDGE DAWSON: Wait a minute, no, you wait a minute, too, Mr. Butsavage. Listen, wait a minute. Are you now saying that there was a time a year prior to 2015 when a customer complained about a church group and you told someone?

THE WITNESS: Yes, ma'am.

JUDGE DAWSON: And you told who?

THE WITNESS: The store manager.

JUDGE DAWSON: Who was that store manager?
THE WITNESS: I can't remember. I can't recall who our store manager was at that time.

JUDGE DAWSON: So when did customer Annemarie come to complaint?

THE WITNESS: Spring of 2015.

JUDGE DAWSON: Was that the first time she had actually complained to you?
THE WITNESS: Yes, ma'am.

JUDGE DAWSON: Now, is that what you're referring to as the second time you received a complaint about church people in the parking lot?

THE WITNESS: Yes, ma'am

Yet, Ms. Wrenn subsequently went from merely confusing to patently evasive:

Q. BY MR. TOWER: And the second occasion in spring of 2015, I believe you said, is the time when you again earlier today said you went and told Mr. High after Annemarie came to you. And my only point is that when you gave a statement in July of 2015, what you said was, "About a year ago, a customer named Annemarie mentioned to me that a church group was soliciting in the parking lot," and I understand the time you got wrong, okay, so forget about a year ago. But "A customer named Annemarie mentioned to me that a church group was soliciting in the parking lot and I said I had already reported it to management." You don't in this statement say that on that second occasion you went to Mr. High and he shrugged his shoulders, do you?

A. No, I don't.

Q. Why is that?

A. I just didn't put it in there, but that's what he did.

Q. In fact, you don't say anything about going to Mr. High at all –

A. I said store manager.

Q. Well, no, you don't, not on this occasion. The only time you said the store manager was when you were talking about the store manager who you're not able to identify, right?

A. No. If you read that, I say I had already reported it to management.

Q. Yes, you say I told her –

A. That's management.

Q. -- I said I had already reported it to management.

A. That's my store manager; management is store manager. I didn't say Donati High's name, but I said management. He was my manager at the time. I didn't say his name, but I said store management, and he was the manager at that store.[3]

Following this exchange, Ms. Wren eventually conceded that she does not know one way or the other whether store management went and asked the church groups to leave on the two occasions (during her 16 years of employment) that she allegedly reported such complaints. (Tr. 137).

C. Non-Employee Union Representatives Excluded From Property

On April 2, 2015, Kroger's HR Coordinator, Diego Duran, was in Store 538 to conduct talks with employees concerning their transfer options. (Tr. 29). Union Representative, Heith Fenner, was also present in the store for these meetings. (Tr. 45, 58.)

At some point that day, Mr. Duran received information that there were non-employees in the parking lot asking customers to sign a petition. (Tr. 29). Mr. Fenner confirmed that this activity was being led by Union Organizer, Brandon Forrester, whose assignment from the Union was to "petition customers at 538 to support the employees as far as transferring to the Marketplace and asking them not to shop if they [Kroger] don't work with the employees in that manner."[4] (Tr. 57-58.) According to Mr. Fenner, Mr. Forrester was in the parking lot and was

[3] Ms. Wrenn refused to engage with the actual question (what did she actually do after allegedly receiving the compliant from Annemarie), and attempted to muddy the water by acting as if the question was merely whether she had referred to Mr. High by name in the Affidavit.

[4] The Union contended that the "Marketplace" store, which was not represented by the Union, was a desired location for some employee transfers, and that the Union objected to having employees transferred to stores that were a greater distance from Store 538. (Tr. 56, 61-62; General Counsel's Exhibit 3). While Kroger vehemently disputes that anything about its conduct in the transfer of employees from Store 538 was improper, more important for the case at hand is that nothing about this dispute has any bearing upon the present unfair labor practice charge or Complaint. In other words, nothing about the transfer dispute makes it more or less likely that Kroger's actions on

handing customers a petition, which he identified as General Counsel's Exhibit 3. (Tr. 59-60; GC Ex. 3).

Upon learning of this activity in the parking lot, Mr. Duran called Kroger's Labor Relations Manager, Mike Christle, for guidance. (Tr. 45-46). Following that guidance, Mr. Duran procured from the store office a letter from the Landlord to Kroger's Real Estate Manager, explaining the non-solicitation policy and the fact that Kroger was being directed by the Landlord to enforce it in common areas such as the parking lot. (Tr. 30-32; 146). Mr. High and Mr. Donati then approached Mr. Forrester in the parking lot and asked him to leave. (Tr. 29, 62). Mr. Fenner was with Mr. Forrester at that time, as well. (Tr. 61-62). Mr. Forrester responded by telling Mr. Duran that he would not be moving on as requested, stating that he would "only listen to the blue" (meaning police officers). (Tr. 29).

After this exchange, Mr. High and Mr. Duran positioned themselves in the front of the store where they could see if the Union representatives were truly going to reject the instruction to leave. (Tr. 33). When they observed Mr. Forrester approach another customer with the petition, they went ahead and called local law enforcement. (Tr. 33; 145-46). Neither Mr. High nor Mr. Duran ever asked the police to arrest anyone. (Tr. 34).

When the police arrived, Mr. Duran explained the situation and gave the officers a copy of the letter from the Landlord. (Tr. 34-35). The officers went outside, and when they returned they said the Union representatives were claiming that they had a letter telling them that they were allowed to be there as well, but no such letter was ever produced. (Tr. 35). When the Kroger managers asked the police to enforce Kroger's property rights, the officers went outside

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April 2, 2015, were a proper exercise of its private property rights under the applicable law. See Lechmere, Inc. v. N.L.R.B., 502 U.S. 527, 533 (1992); N.L.R.B. v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956).

and told Mr. Forrester to leave. (Tr. 35; 63-64). At that point, both Mr. Fenner and Mr. Forrester left the premises.

III. THE DECISION

The ALJ correctly discredited the portion of Ms. Wrenn's testimony that had to do with Kroger's alleged knowledge of groups soliciting on Kroger's property.[5] ALJD 10:18-20. Nevertheless, the ALJ concluded that the non-employee Union representatives were engaged in protected activity, and that Kroger violated the Act "by excluding union solicitation on its premises while at the same time favoring and permitting charitable and civic solicitation activity." ALJD 15:43-45. The ALJ also mentioned (at least in passing) that Kroger's response to the activity by non-employee Union representatives was "unprecedented" and also constituted evidence of discrimination. ALJD 12:20-24. Kroger then filed these Exceptions to the Decision.

IV. ARGUMENT

A. The Law Permits Employers to Exclude Non-Employee Union Agents

Under established U.S. Supreme Court precedent, once a private employer's property rights are established under state law, the employer generally "cannot be compelled to allow distribution of union literature by non-employee organizers on the employer's property." Lechmere, Inc. v. N.L.R.B., 502 U.S. 527, 533 (1992); see also, Babcock & Wilcox, 351 U.S. 105, 112 (1956) (noting that prior Board holdings to the contrary "failed to make a distinction between rules of law applicable to employees and those applicable to nonemployees"). In Babcock, the Court established that this general rule -- that an employer has the right to exclude such non-employees -- applies: (1) if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message; and (2) the

[5] Citation to "ALJD ___" refers to the page(s) and line number(s) of the ALJ's Decision dated September 9, 2016.

employer's "notice or order" prohibiting such distribution "does not discriminate against the union by allowing other distribution."[6] Babcock, 351 U.S. at 112.

In Lechmere, the Supreme Court also explained that it had previously admonished the Board for its overly expansive reading of the two exceptions to the general Babcock rule permitting exclusion of non-employee union organizers. Lechmere, 502 U.S. at 535. The Court noted that it had held, in a case following Babcock, that "trespasses of nonemployees are 'far more likely to be unprotected than protected'" by Section 7 of the Act. Id. (quoting Sears Roebuck & Co. v. Carpenters, 436 U.S. 180, 205 (1978)). The Court then recited this portion of its Sears decision:

> While Babcock indicates that an employer may not always bar nonemployee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation. That the burden imposed on the union is a heavy one is evidenced by the fact that the balance struck by the Board and the courts under the Babcock accommodation principle has rarely been in favor of trespassory organizational activity." 436 U.S. at 205 (emphasis added; footnotes omitted).

Lechmere, 502 U.S. at 535 (emphasis added). The Lechmere Court went on the reject the Board's analysis in the Jean Country line of cases, 291 N.L.R.B. 11 (1988), on the grounds that the Board's interpretation (of the access exception) "significantly erod[ed] Babcock's general rule that 'an employer may validly post his property against nonemployee distribution of union literature.'" Lechmere, 502 U.S. at 538.

[6] Although the first exception regarding the possible inaccessibility of employees is not at issue here, the Babcock Court's language is nonetheless instructive. By carving out an exception to the non-employee access rule "if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message . . . ," id. (emphasis added), the Court underscored its primary concern that union access to "employees" will be hindered. As discussed below, when, as here, the Union simply wants access to the employer's customers, the Union's claim to Section 7 protection must fail.

Because the parties all agreed (and the ALJ found) that Kroger had a sufficient property right to exclude the Union representatives and that there was no claim that the employees were inaccessible using reasonable efforts, the only question for the Board in this matter is whether the "discrimination" exception is appropriate here. Construing that exception in accordance with Supreme Court precedent, it is evident that it does not apply in this case.

B. Kroger Did Not Discriminate Against The Union Within the Meaning of Babcock & Wilcox

1. The Board Should Adopt the Consensus Position of the Circuits Regarding Occasional Charitable Solicitation

In the aftermath of Lechmere, the Board has issued several decisions in cases presenting facts similar to the case at bar. For example, in Be-Lo Stores, 318 N.L.R.B. 1, 42-49 (1995), the Board found that the employer had forfeited its right to enforce a non-solicitation prohibition with respect non-employee union representatives by virtue of the fact that certain other groups (including a local Lions Club) had engaged in such activity on the employer's property. Id. Similarly, in Sandusky Mall Co., 329 N.L.R.B.618, 621 (1999), the Board determined that "the solicitation by various organizations is sufficient proof of disparate treatment."[7]

The Circuit Courts have repeatedly rejected these Board decisions interpreting the "discrimination" exception to be implicated by the act of permitting occasional civic or charitable solicitation activities. See Be-Lo Stores v. N.L.R.B., 126 F.3d 268 (4th Cir. 1997); Sandusky

[7] The Board described the solicitation activities at Respondent Sandusky Mall as including various "charitable, civic, and other organizations."

> In the months preceding the Respondent's denial of access to the Union, the Respondent permitted an Arthur Murray dance marathon, the Young American Miss Pageant, a United Way Donation Thermometer, a fire escape demonstration, a Fall Craft show, an Easter Seals cake auction, a Corvair show, a free car inspection sponsored by the American Lung Association, and a drug awareness display. During the month of December 1992 itself, when the Union unsuccessfully attempted to handbill, the Respondent permitted access by the Salvation Army, an American Red Cross Bloodmobile, a gift wrapping booth sponsored by the American Lung Association, [**8] and a "gift with purchase" booth sponsored by the Mall Merchants Association.

Sandusky Mall, 329 N.L.R.B. at 619.

Mall Co. v. N.L.R.B., 242 F.3d 682 (6th Cir. 2001). In Be-Lo Stores, the Fourth Circuit rejected the Board's contention that apparent acquiescence in solicitation by certain religious and charitable groups (such as the sale of cookies by Girl Scouts) over the course of several years, prevented the employer's application of a non-solicitation policy to union organizers, noting that:

> To affirm the Board's contrary finding on this record would be tantamount to a holding that if an employer ever allows the distribution of literature on any of its property, then it must open its property to paid nonemployee union picketers. We are confident that the Supreme Court never intended such a result.

Be-Lo Stores, 126 F.3d at 285 (citations omitted).

The Sixth Circuit likewise rejected the Board's interpretation of Babcock in denying enforcement of the Board's order in Sandusky Mall, 242 F.3d 682, 692 (2001). The Sandusky Mall Court noted that the same discrimination issue had been directly litigated in the prior case of Cleveland Real Estate Partners v. N.L.R.B.,, 95 F.3d 457 (6th Cir. 1996), which it found to be controlling. Sandusky Mall, 242 F.3d at 692. Indeed, in Cleveland Real Estate Partners, the court explained in detail why it believed that the Board's interpretation of Babcock was mistaken:

> Babcock and its progeny, which weigh heavily in favor of private property rights, indicate that the Court could not have meant to give the word "discrimination" the import the Board has chosen to give to it. To discriminate in the enforcement of a no-solicitation policy cannot mean that an employer commits an unfair labor practice if it allows the Girl Scouts to sell cookies, but is shielded from the effect of the Act if it prohibits them from doing so. Cf. Guardian Indus. Corp. v. NLRB, 49 F.3d 317, 320-22 (7th Cir. 1995). Although the Court has never clarified the meaning of the term, and we have found no published court of appeals cases addressing the significance of "discrimination" in this context, we hold that the term "discrimination" as used in Babcock means favoring one union over another, or allowing employer-related information while barring similar union-related information.
>
> Although we are respectful of the Board's interpretation, we are not compelled to follow it when it rests on erroneous legal foundations. See Lechmere, 502 U.S. at 539. No relevant labor policies are advanced by requiring employers to prohibit charitable solicitations in order to preserve the right to exclude nonemployee

> distribution of union literature when access to the target audience is otherwise available.

Cleveland Real Estate Partners, 95 F.3d at 465.[8]

Accordingly, Kroger requests that the Board reconsider its prior decisions and issue a ruling on Babcock's definition of discrimination in line with the Circuit decisions discussed above. This is not simply a matter of relenting in the face of disagreement by the Circuits (to whom, Kroger understands, the Board chooses not to acquiesce as a matter of policy), but rather a recognition that reevaluating the reasoning behind these Circuit decisions will lead to a different understanding of the binding U.S. Supreme Court precedent.

As discussed above, the Supreme Court has instructed that, in analyzing the exceptions to the Babcock "general rule," the union's burden is a "heavy one," and the balance struck has "rarely been in favor of tresspassory organizational activity." Lechmere, 502 U.S. at 535 (citations omitted). Yet, if the Board's definition is correct, then this supposedly "rare" exception could be invoked at virtually any retail operation in the United States, certainly any one where Girl Scout cookies are sold, or any other charitable or civic organization has been allowed to have even a brief presence. Surely, such a definition cannot be squared with the teachings of the Supreme Court cases, and a change in the Board's jurisprudence on this issue would merely reflect that reality, rather than indicate that any form of deference is owed to the contrary Circuit decisions discussed above. As such, because the Act and the Supreme Court decisions interpreting it are in accord that an employer may permit the use of its property for occasional

[8] The Court concluded:

> An owner of private commercial property who permits a charitable organization to distribute information or conduct solicitations on its property simply does not implicate the policies of the NLRA and does not, without more, render an employer guilty of an unfair labor practice when later it chooses to follow the general rule of "validly posting its property against nonemployee distribution of union literature." Babcock, 351 U.S. at 112.

Cleveland Real Estate Partners, 95 F.3d at 465.

charitable solicitations without forfeiting its property right to exclude nonemployee union organizers, the Board should adopt such a definition of discrimination in this context.[9]

2. Undisputed Facts Establish That Kroger May Enforce Its Policy on Non-Solicitation

The facts of this case are undisputed in many relevant respects. The actions directly precipitating this unfair labor practice charge – Kroger's resort to contacting law enforcement on or about April 2, 2015, when Union representative, Brandon Forrester, refused to leave the property of Store Number 538 – were described in very similar terms by the two employer witnesses and the one union witness.

That said, Kroger has filed an exception with regard to the ALJ's erroneous finding that Kroger treated the union less favorably than members of an area church (who also had not been permitted to be present) because Kroger called the police only with respect to the union activity. ALJD12:20-24. The Board should overturn the finding that this alleged disparity is evidence of discrimination because, unlike the Union, no other party ever refused to leave when asked, nor had any other party made a claim of a legal right to be present. Clearly, the fact that the church members left the premises when asked to do so constitutes a significant distinguishing factor that the ALJ ignored when imputing a discriminatory motive to the Company.

[9] The Board may also choose to borrow from the employee solicitation context. As the Board explained in Hammary Mfg. Corp., 265 NLRB 57, 57 fn. 4 (1982):

> The Board and the courts consistently have held that an employer does not violate Sec. 8(a)(1) by permitting a small number of isolated "beneficent acts" as narrow exceptions to a no-solicitation rule. Thus, rather than finding an exception for charities to be a per se violation of the Act, the Board has evaluated the "quantum of . . . incidents" involved to determine whether unlawful discrimination has occurred.

Id. (citations omitted). While the Board has previously applied this somewhat subjective test to find discrimination occurred, a small recalibration of the "quantum of … incidents" required before an employer loses its property rights would, perhaps, change the outcome of these cases.

Kroger's witnesses also confirmed that "sporadic" instances of charitable or civic solicitation were permitted, totaling approximately "one [occasion] every month or two." (Tr. 152, 159). These occasional charitable groups were required to request and receive permission, and it was the Store Manager's job to determine that they were appropriate for customers in that community.

Under the circumstances, Kroger's actions do not constitute discrimination against the Union as that term is used in Babcock & Wilcox. Undisputed testimony from multiple witnesses established that Kroger effectively policed unauthorized solicitation at Store 538, and, as discussed supra, the authorized charitable solicitation at the store was conduct of a different character than that engaged in by the Union. Without disparate treatment of similar conduct, there can be no discrimination, and the Board should determine that no such discrimination occurred in this case. See e.g., N.L.R.B. v. Southern Md. Hosp. Ctr., 916 F.2d 932, 937 (4th Cir. 1990) (per curiam) (recognizing "a difference between admitting employee relatives for meals and permitting outside entities to seek money or memberships" and declining to find discrimination by the hospital).

C. The Excluded Union Representatives Were Not Engaged in Activity Protected by Section 7 at the Time Kroger Enforced its Policy

Hearing testimony established that the Union's purpose on the day in question was to solicit Kroger customer's to sign a petition not to patronize certain Kroger stores, as a result of the Union's complaints about how employee transfers were being handled at Store 538. Accordingly, the individuals who were excluded from the property were (a) not exercising any organizational rights; and (b) not petitioning for area standards. Rather, they were merely attempting to harm the company's business (by design) in order to express displeasure with a particular aspect of the bargaining relationship between Kroger and its employees.

Such conduct is not protected by Section 7 of the Act. Do-not-patronize activity by non-employee union representatives of a union that has already organized the store in question can only be assumed to be in furtherance a mod-contract modification of the parties' agreement. Indeed, witness testimony seems to confirm that this was the Union's attempt to cause Kroger pain and force it to agree to change its behavior, notwithstanding the existence of a valid collective bargaining agreement between the parties. Under these circumstances, and because the Supreme Court has only dealt with such cases in the organizing context, the Board should conclude that no Section 7 activity is implicated by Kroger's exclusion of the two non-employee Union representatives on April 2, 2015. See Lechmere, 502 U.S. at 532 (noting that Section 7 "by its plain terms … confers rights only on employees, not on unions or their nonemployee organizers," and crafting an exception to employer property rights that would apply "in certain limited circumstances" so that employees could learn of the advantages of self-organization from others); see also N.L.R.B. v. Great Scot, Inc., 39 F. 3d 678 (6th Cir. 1994) (activity purportedly protected engaged in for mutual aid and protection is not protected by Section 7 if it is unrelated to improvement of the terms and conditions of employment); New River Indus., Inc. v. N.L.R.B., 945 F.2d 1290, 1294(4th Cir. 1991) (finding that an sarcastic employee letter that did not relate to employees' working conditions was not protected by the "mutual aid or protection" clause of Section 7).

V. CONCLUSION

For the reasons stated above, the reasons adduced at the hearing in this matter, and for such other and further reasons as may be apparent to the Board, the Kroger's Exceptions to the ALJ's Decision should be granted and Kroger should be awarded such other and further relief as the Administrative Law Judge deems appropriate.

KROGER LIMITED PARTNERSHIP I,
MID-ATLANTIC

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of

KROGER LIMITED PARTNERSHIP I,
MID-ATLANTIC

and 5-CA-155160

UNITED FOOD AND COMMERCIAL
WORKERS, LOCAL 400 (UFCW)

CERTIFICATE OF SERVICE

I, King F. Tower, being duly sworn, do hereby certify that a true and exact copy of the foregoing **"Brief of Respondent in Support of Its Exceptions to the Administrative Law Judge's Decision"** was E-Filed and served by e-mail on this 7th day of October 2016, on the following:

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